Jeremy Thiesfeldt
STATE REPRESENTATIVE • 52nd ASSEMBLY DISTRICT

Testimony – Senate Bill 86 "Felons in Schools"
By Representative Thiesfeldt

Good day. Chairman Wanggaard. Honored members of the committee.

I am here today to urge your support for Assembly Bill 122, the Felons in Schools bill. As I am sure you are aware, this bill has been presented in some form or another over the last 6 sessions. In this lucky 7th attempt I will be brief and to the point about this common sense legislation.

Ideally a school should be a place where students feel safe from the outside world and a place where they can go to safely learn. We must be willing to take the measures necessary to protect our children. This is a simple change that can enhance the safety of our schools.

Unfortunately, with the way Wisconsin's current law is written, our students are forced to unknowingly interact with unpardoned felons if the felony is not substantially related to children. This is a reasonable change that will bring additional flexibility to our school district to protect our children.

The need for this legislation was demonstrated in 1999. The Milwaukee Public School Board then found out that one of their employees had been convicted of severely burning a child with hot grease. Of course, the board wanted to protect its students, and so the board fired the employee. However, the state Labor and Industry Review Commission ruled the firing was discrimination under the Wisconsin Fair Employment Act and forced MPS to rehire the individual. The commission noted, "The Legislature did not choose to exempt schools from the conviction record provisions of the Fair Employment Act."

Well, this legislation does just that. AB 122 creates a very narrow exception that will allow school boards to consider an individual's felony record when making employment determinations.

Here are some major points to understand:

1. This is **not** a mandate on schools.
2. This legislation is simply **voluntary**. Why not give more options to our schools?
3. This bill will **not have any ongoing costs** to implement.
4. Serious convictions have serious **consequences**. Compassion and second chances are important but it is best to err on the side of caution when dealing with our children.
5. This bill is **about local control** and giving **more tools** to school boards.
6. This bill is about being pro-active and not sitting back waiting for the next bad thing to happen.

Finally, as you know, local school boards are responsible for ensuring that their schools remain safe havens for their children. This bill gives school boards that tool to provide extra protection and prevents school boards from being penalized for exercising their responsibility and best judgment.

Thank you.

Serving the City of Fond du Lac and the Communities of North Fond du Lac, Eldorado, Taycheedah and Friendship

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THE SCHOOL DISTRICT OF NORTH FOND DU LAC

225 McKinley Street
North Fond du Lac, WI 54937
Telephone (920) 929-3750

Monday, May 30th, 2011

RE: Support of AB 122

Dear Representative Thiesfeldt:

I am support of Assembly Bill 122 that would allow school districts another tool in the screening and hiring of staff. Although current law does allow for the exclusion of any person that has committed a felony that would directly impact the ability to work in schools, this proposed bill would allow a school more latitude in the ability to be more selective of the people that are hired to serve our children.

I read this bill as another tool, not an absolute as it applies to the hiring of staff. If a person has committed a crime, served his or her debt to society and the human resources department of a school district views this candidate as a potential employee, it would be the district's choice to hire them or not.

Thank you for thinking about the safety of our students

Sincerely,

Aaron Sadoff - Superintendent

June 7, 2011

TO: Members, Senate Committee on Labor, Public Safety and Urban Affairs

FROM: Attorney A. Steven Porter, Board Member
Civil Rights and Liberties Section
State Bar of Wisconsin

RE: Opposition to Senate Bill 86 (employment discrimination)

The Civil Rights and Responsibilities Section of the State Bar of Wisconsin opposes Senate Bill 86 because it would close the doors to employment opportunities for ex-offenders without justification. This legislation would allow an educational agency to refuse to employ or to terminate from employment a felon, regardless of whether the elements of the offense substantially relate to the circumstances of a particular job. The bill would result in denial of jobs to qualified applicants, frustrating the State's efforts to reintegrate ex-offenders into society and its efforts to reduce recidivism.

Employment of offenders who have paid their debt to society plays an important role in reintegrating them back into the community and reducing recidivism. Everyone benefits when ex-offenders successfully turn their lives around to become contributing, law-abiding members of the community – the neighbor, the family, the friend and the taxpayer.

When the doors to employment opportunities are shut, it makes it that much harder for ex-felons to begin anew and steer clear of crime. As more crimes are classified as felonies, ex-offenders will find it increasingly more difficult to find a job. Denial of gainful employment can drive criminals to reoffend. When this happens, a heavy price is paid: public safety is jeopardized; our courts are burdened; and state taxpayers are saddled with the ever-increasing cost of our correctional system.

Should employers ever be allowed to deny someone an employment opportunity based on his or her criminal record? State law says yes. Current law allows employers, including schools, to discriminate on the basis of conviction records where the "circumstances of the offense substantially relate to the circumstances of a particular job." If the criminal offense does not relate to the job, MUST the employer hire the person? State law says no. Current law simply does not allow an employer to automatically reject an applicant simply because of the felony record. Employers can refuse to hire for other reasons.

The Civil Rights and Liberties Section of the State Bar of Wisconsin believes current law strikes the appropriate balance. It promotes the common goal of reducing recidivism while giving

employers the ability to refuse to hire felons whose offense relates to the job. For these reasons, the CRL Section opposes Senate Bill 86 and urges you not to recommend this bill for passage.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

WISCONSIN ASSOCIATION OF SCHOOL BOARDS

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JOHN H. ASHLEY, EXECUTIVE DIRECTOR

TO: Members, Senate Committee on Labor, Public Safety and Urban Affairs
FROM: Dan Rossmiller, Government Relations Director
DATE: June 7, 2011
RE: **Senate Bill 86**, Relating to Permitting an Educational Agency to Refuse to Employ Or Terminate an Unpardoned Felon.

The Wisconsin Association of School Boards (WASB) **supports** Senate Bill 86.

Wisconsin law provides that an employer may not discriminate against an employee or prospective employee based on his or her criminal conviction record unless the conviction is substantially related to the circumstances of the particular job.

Senate Bill 86 creates a new statutory section that would permit an educational agency (including a school board) to refuse to employ or to terminate from employment an individual who has been convicted of a felony and who has not been pardoned for that felony, whether or not the circumstances of the felony substantially relate to the circumstances of the particular job.

Similar legislation has been introduced in past legislative sessions dating back at least a decade but has not been enacted. The original impetus for this legislation was a well-publicized 1999 discrimination case brought by a school employee who had been convicted of the felony offense.

In that 1999 case, an administrative law judge overturned the Milwaukee Public Schools' decision to terminate a Boiler Attendant Trainee who had been convicted of injury by conduct regardless of life. The individual had been involved in an argument with his then girlfriend and threw hot grease in a frying pan at her. The grease seriously burned the girlfriend's 20-month-old daughter who was standing between them.

The individual had been employed by Milwaukee Public Schools (MPS) as a building service helper for nearly 10 years without incident before the conviction occurred. Following the conviction, the individual applied to become a boiler attendant at MPS, but he failed to disclose his conviction record on the application.

Based on the violent nature of the conviction, the fact that the victim was a small child, and that the individual would be working in school buildings during the time that children were present, MPS terminated his employment. The employee successfully appealed that decision.

The administrative law judge determined that the position of boiler attendant was not substantially related to his conviction record and ordered that his employment, including back pay and benefits, be restored. The case proceeded through several levels of appeals. The Labor and Industry Review Commission affirmed the ruling of the administrative law judge. The circuit court and the court of appeals both ruled in favor of the employee.

The court of appeals set forth a test for determining whether the circumstances of the conviction are substantially related to the particular job. The employer must determine "whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context based on the traits revealed." The circumstances to be considered by the employer and the reviewing courts are those that foster criminal activity, "e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person." This includes, in part, an analysis of the risk of recidivism.

Given this precedent, a school district runs the risk of fighting a costly lawsuit if it makes a wrong decision in applying this test. Even when the district's decision is upheld, fighting an action challenging the decision can be costly. A case appealed to the Labor Industry Review Commission can easily run into the tens of thousands of dollars, and more if appealed further to circuit court. As in other types of discrimination cases, "fee shifting" is involved. If an employee prevails in the appeal, the school district must pay not only its own attorney fees but the attorney fees of the employee as well, adding to the cost.

In the 1999 case involving the MPS employee, the LIRC decision noted "The Legislature did not choose to exempt schools from the conviction record provisions of the Fair Employment Act." The Court of Appeals decision similarly noted that Legislature had not created a blanket exception to the prohibition against employment discrimination because of a conviction record for schools—although such blanket exceptions had been created in other instances (employment of private detectives and installers of burglar alarms, for example).

In response, lawmakers introduced legislation in 1999, 2001 and 2003 to allow educational agencies to refuse to employ or to terminate from employment an unpardoned felon. One of those bills, 2003 Assembly Bill 41, was approved by both houses of the legislature, but was vetoed by Governor Doyle. The Assembly's attempt to override the governor's veto fell three votes short of garnering the necessary two-thirds vote. Similar bills have been introduced since the 2003 session, but none has advanced as far.

If Senate Bill 86 is enacted, a convicted felon would no longer hold, in effect, a statutory right to employment in a school setting when the circumstances of the individual's conviction are not substantially related to the circumstances of the job.

Under this bill, school districts may still attempt to balance the interests of convicted criminals who apply for employment positions with society's competing interest in protecting its children in the public school setting. Whether a convicted felon should be employed in a particular district position would be left to the school district.

WISCONSIN CATHOLIC CONFERENCE

TO: Members, Senate Committee on Labor, Public Safety, and Urban Affairs

FROM: John Huebscher

DATE: June 7, 2011

RE: Senate Bill 86, Employment of Unpardoned Felons in Schools

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The Wisconsin Catholic Conference appreciates the opportunity to provide informational testimony on Senate Bill 86, which would permit public and private schools to refuse to employ or to terminate from employment an unpardoned felon.

Our interest in this legislation is twofold and it reflects the challenge of weighing different goods that sometimes conflict when making laws and policies.

First, we strongly believe that all children deserve a safe environment in which to learn. We applaud efforts to maintain a safe place within all schools. And we support the provisions of current law that permit employers to deny a job to a person who has been convicted of a crime that is related to the job he or she is seeking.

We also believe in public policies that foster restoring both victims of crimes and offenders to full participation in the community. In 1999, Wisconsin's Roman Catholic bishops issued *Public Safety, the Common Good, and the Church: A Statement on Crime and Punishment in Wisconsin*. In their statement, the bishops stress the importance of mercy and forgiveness, and call for society to exercise mercy as a means of furthering the rehabilitation process. The bishops also emphasize that public policies and responses must be fashioned in ways that heal victims betrayed by crime and restore dignity to offenders.

As you know, the Catholic Church operates schools to educate children and it is committed to making sure they are safe environments. The Church also supports faith-based ministries, like Project Return, that help felons find sustainable employment. These missions are not contradictory. Indeed, Project Return has helped felons find employment in both public and nonpublic schools.

As we weight these goods, we ask you to consider modifying Senate Bill 86 to better accommodate these twin goals.

As drafted, the bill limits the ability of offenders to secure gainful employment even when their crimes are unrelated to the position they are seeking or to the life and security of our children.

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As an alternative, we invite you to consider an approach suggested in 2001 and again in 2007. This alternative is based on the provisions of Wis. Stat. s. 118.19, governing teacher licensure which provides that the state superintendent may not license a person as a teacher if the applicant has been convicted of a felony (Class A, B, C, or D) under Chapter 940 (which addresses crimes against life and bodily security) or Chapter 948 (which addresses crimes against children) until six years have passed since the conviction and the person establishes by clear and convincing evidence that he/she is entitled to a license.

Inasmuch as teachers have the most unsupervised face-to-face contact with our children it seems unreasonable to place a greater barrier to employment before other employees who have less access to children. At the same time, limiting this bill to crimes mentioned in s. 118.19 also provides more clarity as to which offenses warrant denying employment.

We are also concerned about the impact of SB 86 on people of color. Though less than ten percent of our state's population, minorities account for nearly half of our prison population. Unemployment among African-American men is still more than double that of white men. It is important to assess how this bill will affect that statistic.

Finally, schools systems and other employers can refuse to employ, or terminate from employment, any person whose conviction is substantially related to the circumstances of an individual's job (Wis. Stat. s. 111.335(1)(c)). Refusal to employ a person simply because they have a criminal conviction unrelated to their potential job duties is discrimination under the law. In order to avoid a charge of discrimination, school districts and other employers must seriously review whether or not to hire a person due to their criminal record.

If this prohibition against discrimination in hiring practices is completely eliminated for schools, it is likely most schools will not seriously consider hiring any person with a felony on their record, regardless of the type of offense. While the doctrine of sovereign immunity may protect a public school district from any liability that could be potentially incurred from the hire of an ex-offender, what district would hazard that liability when no charge of discrimination is at stake? There is even less incentive for such hires among private schools that do not enjoy sovereign immunity protection.

We believe current law in this area has served us well. Wisconsin continues to have lower crime rates than the rest of the nation. Clearly, the fact that a felon can't be denied a job unless his crime is related to the position he seeks has not made Wisconsin a dangerous place to work or live. Rather, one can argue that our crime rate is lower because our laws make it easier for ex-offenders to support themselves upon completion of their sentence.

We appreciate the opportunity to offer this informational testimony on SB 86. We respectfully request the committee to carefully consider the ramifications of a bill that could increase recidivism rates in Wisconsin.

EQUAL JUSTICE UNDER LAW

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LEGAL Action
OF WISCONSIN
40 Years of Justice

TO: Senate Committee on Labor, Public Safety and Urban Affairs

FROM: Bob Andersen

RE: Senate Bill 86, relating to: Permitting an Educational Agency to Refuse to Employ or to Terminate from Employment an Unpardoned Felon.

DATE: June 7, 2011

Legal Action of Wisconsin, Inc. (LAW) is a nonprofit organization funded by the federal Legal Services Corporation, Inc., to provide civil legal services for low income people in 39 counties in Wisconsin. LAW provides representation for low income people across a territory that extends from the very populous southeastern corner of the state up through Brown County in the east and La Crosse County in the west. LAW administers a project directed at removing legal barriers to employment to help people become employed.

1. **If SB 86 is Enacted, Educational Institutions Will Have to Maintain Two Processes for Hiring and Firing Employees – One for Minorities, Where a Business Necessity or Relationship Test Must be Shown Regarding the Felony Conviction, and a Second One for Non Minorities, Where Felony Status Alone Will Disqualify the Person.**

Current law is a codification of decisions of the U.S. Supreme Court, federal and state courts, the Equal Employment Opportunities Commission (EEOC) and the state Equal Rights Division (ERD), holding that discrimination against minorities on the basis of conviction record, in the absence of "business necessity," constitutes race discrimination – the enactment of SB 86 will not change this law.

Attorneys who represent employers have testified at previous hearings on this legislation that they will continue to advise their clients to comply with the federal requirements under Title VII of the Civil Rights Act of 1964, when considering the employment of minorities. Federal law requires employers to look at business necessity or a relationship test, when addressing the employment of minorities.

Current ***state*** law stems from these federal decisions. In a way, what current ***state*** law does is to extend to ***non minorities*** the protections that exist for minorities. One of the considerations in the enactment of this law is the avoidance of ***reverse discrimination***. It is possible that a ***non***

minority would be able to bring a claim under the Equal Protection Clause, for not having the same protection as does a minority.

In any event, the state legislature cannot do anything to diminish the right that a minority has under federal law. An educational institution would be foolish to refuse to hire or to fire a minority person solely because the person has a felony record.

As a result, if this bill is enacted, educational institutions will have to maintain two processes for hiring and firing employees: one for minorities that continues to look at a relationship test or a business necessity test, when considering minorities, and one for non minorities, which allows a consideration of felony record alone.

In this regard, this bill actually will do a disservice to educational institutions who rely on it and who look no further than a minority person's felony record. Such an educational institution will easily expose itself to liability by not conducting some scrutiny regarding business necessity or a relationship test, in its treatment of a minority person.

An educational institution is better served under current law, where it would not be mislead into a false sense of security.

The U.S. Supreme Court ruled in Griggs v. Power Co., 401 U.S. 424 (1971), that discrimination based on circumstances which have a "disparate effect" on persons because of their race or national origin, ***is in fact*** discrimination based on ***race or national origin*** and is prohibited by Title VII of the Civil Rights Act of 1964, ***in the absence of a showing of "business necessity"*** in a particular case. This decision was followed by a number of federal and state court decisions, and decisions of the EEOC and ERD, in ruling that discrimination based on criminal record for minorities is ***in fact*** discrimination based on ***race or national origin***, in violation of Title VII of the Civil Rights Act of 1964. This is so, because minorities have a greatly disproportionate record of convictions. The logic, then, is that to refuse employment or to take other adverse job treatment of a minority because of a record of conviction, without an adequate business reason, is ***in fact*** an adverse treatment of an employee because of race or national origin. It is racial discrimination in violation of Title VII and in violation of Wisconsin's statutory prohibition against discrimination based on race.

The Equal Employment Opportunities Commission (EEOC) states in its guidelines that an employer may only exclude an applicant because of a criminal conviction if there is a business necessity.

> "To establish business necessity, the employer must show that three factors were taken into consideration in the hiring decision: the nature and gravity of the offense(s); the time that has elapsed since the conviction and/or completion of the sentence; and the nature of the job held or sought," according to the EEOC. "For example, business necessity exists where the applicant has a fairly recent conviction for a serious offense that is job-related."

Even if SB 86 is enacted, minorities will continue to be able to process complaints through either the state Equal Rights Division or through EEOC, as they do now. Where minorities are discriminated against based on felony records, educational institutions will have the burden of showing that their hiring or firing decisions are due to "business necessity" or that there is some job relatedness between the conviction and the job sought – in accordance with federal law requirements, notwithstanding the enactment of SB 86.

The "disparate impact" theory is still the law of the land. In April, 2002, the U.S. Supreme Court dismissed an appeal in an age discrimination case challenging the "disparate impact" theory, Adams v. Florida Power Corporation, No. 01-584. While there was no explanation given by the court for its dismissal, it was a dismissal of a case that the court had earlier approved for appeal and had even heard arguments on. In any event, the dismissal of the case means that the "disparate impact" theory is still the law.

2. SB 86 is Going in the Wrong Direction: The Movement Nationally and in Wisconsin is Towards Rehabilitating Ex-Convicts in the Face of Massive Incarceration Efforts Over the Past Several Years.

650,000 people are released from prisons and over 7 million people are released from jails each year nationally, according to the Re-Entry Policy Council. Virtually every person incarcerated in a jail in this country – and 97 percent of those incarcerated in prisons – will eventually be released. The Re-Entry Policy Council was established in 2001 by The Council of State Governments to assist state government officials grappling with the increasing number of people leaving prisons and jails to return to the communities they left behind.

In 2004, 500 felons were released from prison to Dane County, according to an article by Phil Brinkman for the Wisconsin State Journal (WSJ – September 27 2005).

The state's inmate population has tripled in 15 years, from less than 7,000 in 1989 to more than 22,000 today, according to a January 17, 2005 WSJ article by Brinkman. The incarceration rate has also nearly tripled.

National studies indicate as many as 60 percent of inmates remain unemployed one year after release, while two in three are re-arrested within three years and nearly one-half will end up back in prison, according to a January 16, 2005 WSJ article by the same author. The cost to taxpayers can be enormous. It costs Wisconsin taxpayers $28,088 on average per year to keep each of the estimated 22,000 men and women in prison and $2,041 a year supervising more than 67,700 people on probation or parole, according to the same article.

These and other statistics have led the Wisconsin State Journal to editorialize that we need to be effective, not soft on crime (January 28,2005). We need to "recruit employers to hire former inmates. Many offenders have poor work histories but those under close supervision will have a compelling incentive to show up on time and ready for work."

These articles of the Wisconsin State Journal are part of a series that may be found at http://www.madison.com/wsj/spe/prison. They are a series of 15 articles exhorting the public and policy makers to make sensible decisions about treating crime and the rehabilitation of ex-convicts.

A January 22, 2005 WSJ article summed up the shift in direction that has been occurring among policy makers by quoting former State Senator Bob Welch, in remarks he made about creating halfway houses for the reintegration of offenders. The article said that "Welch had been one of the strongest supporters during the 1990's for longer prison terms and abolishing parole."

It quoted Welch as saying, "As far as I am concerned, I was on the winning side of that and got my way. . . Now, I am circling back and saying, 'OK, now that I know we're going to lock up the bad guys for a sufficient length of time, now we've got to look at what happens when they get out."

3. **Employment is Critical in the Rehabilitation of Ex-Offenders and the Treatment of Ex-Offenders has a Profound Effect on African Americans.**

Numerous studies conducted in the past show the importance of meaningful employment in the rehabilitation of ex-offenders. In a recent study, Princeton University Department of Economics Professors Bruce Western, Jeffrey Kling, and David Weiman, in their January 2001 publication entitled, "The Labor Consequences of Incarceration," found that the treatment of ex-offenders has a profound effect on African-American males. ***On a typical day two years ago, Professor Western was quoted as saying, 29% of young African American male high school dropouts ages 22-30, were employed, while 41% (up from 26% in 1990) were in prison. He said that ex-offenders who do get jobs start work making 10-30% less than other African American high school dropouts.***

Professor Western also said that, without adequate jobs, these ex-offenders are unable to pay court costs that come out of their convictions, restitution to victims, and child support for their families. Professor Western was quoted to say that "we know that employment discourages crime, and because their employment opportunities are poor, they're more likely to commit crime again."

4. **Senate Bill 86 is Too Broad in Its Definition of What Employers are Covered**

The definition of an "educational agency" goes far beyond the elementary school setting that the authors of this bill generally have in mind with this bill. It covers a wide range of facilities that house adults: "a state correctional institution under s. 302.01, the Wisconsin Center for the Blind and Visually Impaired, the Wisconsin School for the Deaf, the Mendota Mental Health Institute, and a state center for the developmentally disabled." First, these are institutions who take care of adults who are not the people that this bill seeks to protect. The enactment of this bill would adversely affect employees in settings where children are not involved. Secondly, these are also

institutions who employ invaluable people who are likely to have felony records. The mental health institutes have teachers and counselors, among others, who are among the best at their trade because they have had drug problems that left them with felony convictions.

5. Current Law Allows Employers, Including Schools, to Discriminate Against Employees on the Basis of Conviction Records, Where the "Circumstances of the Offense Substantially Relate to the Circumstances of a Particular Job." – SB 86 Allows Employers to Discriminate Against Employees Solely Because They Checked a Box Marked "Felony Convictions" Alone.

Under ***current law***, a public or private employer may refuse to hire someone, or may terminate the person's employment, on the basis of ***any conviction record***, if there is a ***substantial relationship*** between the ***circumstances*** of that ***offense*** and the ***circumstances of the particular job***. This is perceived to be a better approach than looking only at the ***conviction***, because looking at the circumstances involved in the crime is far more revealing for an employer than looking only at what a person was convicted of -- especially where the person was convicted of a lesser offense. Current law does ***not require*** an employer to hire a person with a conviction record; it simply does ***not allow an employer to automatically*** reject an applicant who has checked a box on an application marked "felony conviction," for example. ***Employers can refuse to hire someone for any other reason. SB 86*** would allow these employers ***to automatically reject*** an applicant or fire an employee with ***any felony record***, for ***simply having checked a box marked "felony conviction."*** Over the years, a great number of crimes have been reclassified as felonies -- resulting in 5 different classes of felonies today. Heading #11 below reveals the host of felonies which would allow these employers to automatically reject applicants or to fire employees who have been convicted of offenses which may well bear no relationship to the circumstances of their particular jobs.

6. Automatically Denying Jobs to Applicants Based on Felony Records Frustrates State Efforts to Put its Residents to Work, Contributes to Recidivism, and Endangers State Residents' Safety and Property.

If SB 86 were to be enacted, these employers would still be able to hire an applicant with a felony record, of course. However, the enactment of this bill would promote a policy for these employers statewide that would deny employment to people based solely on their felony convictions. This frustrates the goal of the state in ensuring that its residents are engaged in gainful employment. It frustrates the goals and success of W-2, because many W-2 participants have felony convictions in their past, especially since the definition of felonies has been broadened. In addition, without employment, people are driven to commit crimes to support themselves. Numerous studies have shown that employment is one of the most important factors in combating recidivism. When people are driven to commit new crimes, more residents of the state become the victims of crime.

7. Current Law is Not a Burden on Employers

According to the testimony of the Equal Rights Division of the Department of Workforce Development on this same legislation during the 2003 session, following is the record of these cases for 2001 and 2002:

For calendar years 2001 and 2002, the following number of complaints involved an allegation of conviction record discrimination against an educational agency:

5 complaints in 2001
9 complaints in 2002

During those years, there were no findings of probable cause against any educational agency, no appeals of findings of no probable cause and no hearings held. Three of the complaints received in 2002 remain in investigation.

This is consistent with an article in the August 28, 1999 edition of the *Milwaukee Journal Sentinel*, which reported that for ***all employers*** the records of the Equal Rights Division indicate that from January 1, 1997 to August 26, 1999, a total of ***131*** claims of discrimination based on arrest or conviction records were filed. Of those, only ***22*** were shown to have probable cause -- meaning that the claims would go any further. Of those, in only ***2*** claims was it shown that the action of the employer was in violation of the law.

In other words, in almost all claims there is always some "substantial relationship between the circumstance of the offense and the circumstances of the job."

For example, in one of the few court decisions to come out of the statute, the Supreme Court found that there was a "substantial relationship" between a record of armed robbery and a job as a bus driver, so as to entitle the employer to refuse the job to the applicant on that basis alone. ***Similarly, LIRC and county court decisions have held that convictions involving drug trafficking are substantially related to jobs as a district agent for an insurer, youth counselor for emotionally disturbed juveniles, a school bus driver, a home health aid, a paper mill machine operator, and a door to door salesman.***

With this stark reality as a background, anecdotal claims of inconvenience for employers or of cases that are contrived by lawyers to extort money from employers become difficult to imagine.

8. The Value of Current Law, Then, is Simply to Prevent Employers from Establishing Application Forms that Automatically Reject Applicants who Check a Box Marked "Felonies."

Under current law, these employers can easily refuse to hire someone for "other reasons," or

because they want to hire someone else. They simply cannot say they are refusing to hire someone because of a "felony conviction" ***alone***.

9. Other States' Laws

Several states fair employment agencies and courts have issued decisions based on "disparate effect." Some have included "disparate effect" in their administrative rules or statutes, e.g. Iowa. In addition, at least the following several states have created special laws -- either by statute or by administrative action of Human Rights Commissions -- prohibiting discrimination based on conviction:

There have been at least two recent developments in other states, as states attempt to address the growing problem of putting ex-offenders to work:

Delaware enacted a law last year lifting the ban on licensing for individuals with felony convictions for over 35 professions and occupations. The legislation provides that licenses may only be refused if the applicant has been convicted of crimes that are "substantially related" to the licensed profession or occupation.

Illinois enacted a law this year that provides that the records of most misdemeanors and Class 4 felony violations are to be sealed, provided that certain conditions are met. The sealing of the records means that they cannot be part of an official record that can be used against people. The conditions are that 3 years have elapsed for misdemeanors and 4 years for felonies, and the persons have not committed another offense.

Illinois Commission Guidelines also have been existence for some time and have the force of law and similarly applies to all employers:

"Use of such criteria [arrest or conviction information] operates to exclude members of minority groups at a higher rate than others, since minority members are arrested and convicted more frequently than others. Such criteria are therefor unlawfully discriminatory unless the user can demonstrate in each instance that the applicant's record renders him unfit for the particular job in question." An applicant may be disqualified for a job based on a conviction if "(I) state or federal law requires the exclusion or (ii) the nature of the individual's convictions considered together with the surrounding circumstances and the individual's subsequent behavior reveals the individual as objectively unfit for the job." [emphasis added]

Otherwise, the following states maintain similar restrictions:

Hawaii prohibits both private and public employers from discriminating because of any court record, unless a criminal conviction record bears a rational relationship to the duties and responsibilities of a particular job.

New York statutes prohibit discrimination by any employer based on the applicant or employee

having committed a criminal offense, ***without allowing employers any exception***.

Washington prohibits discrimination by any employer on the basis of conviction records, except for those related to a particular job which are ***less than 7 years old***, under regulations issued by the Washington State Human Rights Commission.

Minnesota provides that consideration of a criminal record by a private employer cannot be an absolute bar to employment and that the job-relatedness of the crime must be considered, under the administrative policies set forth in the Minnesota Department of Human Rights Pre-Employment Inquiry Guide. The guide is not an administrative rule, but the effect is the same, since it would be risky to ignore it, because it is the state agency's interpretation of state law.

Colorado's Civil Rights Commission similarly has issued a pre-employment guide which provides that it may be a discriminatory practice for an employer to even make any inquiry about a conviction or court record that is not substantially related to job. While this is not expressed as a mandate, again, it would be risky to ignore it, since it is an interpretation of state law by the state agency.

Ohio's Civil Rights Commission pre-employment guide similarly advises employers that even any inquiry into convictions of applicants for jobs is unlawful, ***without any reference to "substantial relationship***."

Connecticut statutes prohibit state employers from discriminating based on conviction record, unless the employer considers ***all*** of the following: (1) the relationship of the crime to the job; (2) the rehabilitation of the applicant or employee; and (3) the time that has elapsed since the conviction or release of the applicant from prison or jail.

Florida statutes prohibit a state or municipal employer from discriminating based on a conviction record, unless the crime is (1) either a felony or first degree misdemeanor and (2) is ***directly related*** to the employment position sought. In other words, an applicant may not be discriminated against for having committed a lesser misdemeanor, even if it is directly related to the job.

10. Limiting the Repeal of the Prohibition to Only Felony Convictions, Still Extends the Repeal to a Broad Range of Conduct, Especially as More Crimes Have Become Classified as Felonies over the Years

Over the past several years, the list of felonies has exploded. What used to be a misdemeanor, in many cases, is now a felony. Section 939.50 of the statutes now lists nine different classes of felonies. The following offenses are felonies: possession of controlled substances (which accounts for the great majority of criminal offenses); $500 or more damage to a coin operated machine; graffiti to a sign of a public utility or common carrier; graffiti damage to any other person's property that exceeds $2500; operating a vehicle without the consent of the driver;

removal of a part of a vehicle without the owner's consent; issuance of a check for more than $2,500 with insufficient funds in an account; forgery; property damage to a public utility; stalking with the use of public records or electronic information; threat to accuse another of a crime; theft of property in excess of $2,500; threat to communicate derogatory information; receiving or concealing stolen property of a value in excess of $2,500; distribution of obscene materials; solicitation of prostitution; conducting an unlawful lottery; bribery; bribing a public official; possession of burglary tools with the intent to enter a room or building designed to keep valuables; providing special privileges to a public official in return for favorable treatment; theft of cable or satellite services; theft or fraud against a financial institution of more than $500; cohabitation with another by a married person; failure to pay child support for 120 days; action by a public official to take advantage of office to purchase property at less than full value; interference with the custody of a child for more than 12 hours; perjury; false swearing; destruction of public documents subject to subpoena; making a communication to influence a juror; fraud on a hotel or restaurant owner in excess of $2,500; transferring real or personal property known to be subject to a security interest; threatening to impede the delivery of an article or commodity of a business; damage to mortgaged property in excess of $2,500; threatening to influence a public official to injure a business; falsification of records by an officer of a corporation; destruction of corporate books by an officer of the corporation; fraudulent use of credit cards; theft of telecommunications services, cellular telephone services, or cable TV services for the purpose of financial gain; modifying or destroying computer data to obtain property; adultery; incest; theft of library materials of a value in excess of $2,500; criminal slander of title of real or personal property; flag desecration; theft of trade secrets; retail theft of a value in excess of $2,500; intentional failure of a public official to perform a ministerial duty; and providing false information to an officer of the court.

11. The Debate on this Bill Over the Past Several Sessions is Now Dwarfed by a New Development – the Creation of CCAP for Easy Internet Access for Anybody to Check Up on Anybody Else's Arrest or Conviction Record.

CCAP is a public domain created by the Wisconsin court system that now allows anybody access to the records of their fellow citizens at the touch of a button on their own personal computers. It has been recorded that there are over 1,000,000 hits per day on CCAP, according to the Director of State Courts, John Voelker. Employers checking out potential employees, landlords checking out potential tenants, parents checking out the backgrounds of boys who want to go out with their daughters, young people checking out others that they may want to date, neighbors checking out the background of their neighbors.

The existence of this new system underscores both (1) the need for the current statute requiring employers to show that there is a substantial relationship between the circumstances of a felony conviction and a particular job, because of all the information that is out in the public now and (2) the vitality of an argument that has been made against this legislation from the very beginning – that employers ***in fact*** refuse to hire people with felony records. They just don't make it known that the ***reason*** they refuse to hire someone is because of a felony record. ***The law does not***

require an employer to hire a felon. And the new CCAP internet system allows employers plenty of ability to find out about an arrest or criminal record and to refuse to hire the individual for no particular reason at all. ***About the only time that an employer would get caught by this statute is if the employer deliberately announced he was not hiring a person because of a felony record, so that the employer could set up a test case.***

Given this reality, why then is this current statute so important? Because, without it ***educational institutions*** would simply have a box on their applications which asks whether the applicant has ever had a felony record. Once the box is checked by an intake worker, the application will be set aside and the person will be automatically rejected.

Details about the growing CCAP system emerged from the testimony and discussions recently created Legislative Council Committee on Expunction of Criminal Records. The system is far from perfect. Once a criminal charged is dropped against a defendant, the records are not taken off the internet. There is a parallel system for recording records in Wisconsin operated by the Crime Information Bureau. For that system, once a District Attorney drops a charge, the records have to be taken off the system altogether. So, for CCAP, even innocent people are stigmatized.

CCAP claims to have improved its system by providing a summary of what has happened in each case. The problem with this is that readers either never get past the first message that someone is being prosecuted or, if they do, they don't fully understand what follows. Their overall impression for someone whose charges have been dropped or who were found innocent, is likely to be that the individual got off on a technicality. As a result, people who are innocent are wrongly stigmatized.

In the context of the work of this Legislative Council Committee, it is interesting to note that a business representative on that committee, who is a lawyer, said that the current statute works fine. He liked the expression that there has to be a substantial relationship between the circumstances of the offense and the circumstances of the job, which he thought is reasonable and has worked well. His comments were made when he asked why there should be any need for improvement of the law on expunction, which also addresses employment problems.

The Director of State Courts, John Voelker, told the committee that the WCCA oversight committee initially approached the legislature to address [1] whether CCAP information should be continued (because of its profound effect on employment, housing, "nosey neighbors," etc.); [2] whether information could be made to be more accurate (again with the same considerations in mind); and [3] whether a new mechanism should be created to allow information to be removed from the data base.